No. 96-1290

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ARTHUR A. COLLINS, INC.,
Petitioner,
v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION ON BEHALF OF LUCENT TECHNOLOGIES, INC. REAL PARTY IN INTEREST

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QUESTIONS PRESENTED

1. Whether the court below properly held that a state-law tort suit that seeks a determination that an earlier, final judgment of an appellate court is "wrong" is necessarily a collateral attack on the prior judgment, and that such a tort suit cannot proceed unless the plaintiff first obtains equitable relief from the prior judgment.

2. Whether, in its alternative ruling, the court below properly applied well-settled principles of collateral estoppel to the unique facts of this case.

3. Whether the court below properly sanctioned petitioner for persisting in efforts to nullify a ruling of the Federal Circuit under the guise of a state-law tort action designed to evade the limitations governing equitable relief from judgment.

STATEMENT REQUIRED BY RULE 29.6

Between the time the Fifth Circuit issued its first and second opinions in this case, AT&T divested itself of certain lines of business, which were transferred to Lucent Technologies, Inc. ("Lucent"). Pursuant to that divestiture, all rights and obligations of this litigation were assigned to Lucent. As a result, the nominal respondent in this action, American Telephone and Telegraph Company (now known as AT&T Corp.) has no interest in the litigation, and the real party in interest is Lucent. Out of an abundance of caution, this statement provides the information required by Rule 29.6 for both AT&T Corp. and Lucent.

Lucent Technologies, Inc. has no subsidiaries. It owns an equity interest in the following publicly traded company:

Triquint Semiconductor, Inc.

AT&T Corp. has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong)

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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BRIEF IN OPPOSITION ON BEHALF OF LUCENT TECHNOLOGIES, INC. REAL PARTY IN INTEREST

The unpublished decisions below do not conflict with the decisions of this or any other court and raise no issues worthy of this Court's review. In an effort to show otherwise, petitioner mischaracterizes both the lower court's ruling and the real nature of this lawsuit, which is an improper attempt to nullify a final judgment of the Federal Circuit through a state-law tort action. In that action, petitioner alleges that respondent made "fraudulent" *inter partes* arguments to the Federal Circuit, which in turn made a finding that is "wrong." The courts below properly held that petitioner cannot maintain such a "tort" suit unless and until it first obtains equitable relief from the Federal Circuit's judgment. This unremarkable ruling

is consistent with this Court's decisions, the decisions of other courts of appeals and the provisions of Rule 60(b), all of which confirm the frivolous nature of petitioner's claims. The courts below also ruled that petitioner's claims are barred by collateral estoppel. This decision, which is based on the unique facts of this case, is likewise entirely correct and raises no issues requiring this Court's attention.

COUNTERSTATEMENT

1. This suit grows out of a prior patent infringement action that petitioner, Arthur A. Collins, Inc. ("Collins"), instituted against AT&T Corp. ("AT&T")[1] in the United States District Court for the Western District of Texas. Pet. App. 50a. During the trial in this prior litigation, respondent maintained, *inter alia*, that claim 29 of Collins' patent was invalid in light of an article written by Guido Granello entitled *Switching Networks for PCM Time Division Exchanges* ("the Granello reference"). Pet. at 3; *see also* Pet. App. 49a-50a. The Granello reference is a legitimate "prior art" reference that was admitted into evidence, and Collins cross-examined AT&T's expert witness about the reference during the trial. AT&T's Resp. to Collins' Pet. for Reh'g in the Fed. Cir. at 1-2. At the conclusion of the trial, Collins obtained a judgment upon a jury verdict of over $34 million for infringement of claim 29 of Collins' patent, which the jury found to be valid.

AT&T appealed that judgment and argued in its opening brief to the Federal Circuit that claim 29 was invalid in light of the Granello reference. Pet. at 4.[2] Petitioner

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[1] Between the time the Fifth Circuit issued its first and second opinions in this case, AT&T divested itself of certain lines of business, which were transferred to Lucent Technologies, Inc. ("Lucent"). Pursuant to that divestiture, this litigation was assigned to Lucent.

[2] In its opening brief, AT&T also noted that the Patent and Trademark Office ("PTO") had concluded, in a reexamination proceeding AT&T had initiated, that claim 29 was invalid in light

chose not to respond to the merits of this argument and instead argued only that AT&T was barred from raising the Granello reference on appeal because AT&T had allegedly abandoned reliance on it in the trial below. On November 5, 1993, the Federal Circuit reversed Collins' judgment and invalidated claim 29. The Federal Circuit concluded that claim 29 was obvious in light of the Granello article and two other articles known as "Mack & Patrusky" and the "Final Technical Report." Pet. App. 34a, 36a-37a. The court explained that "*both* Granello . . . *and* the Final Technical Report . . . teach [the] individual space and time switch modules" that Collins claimed were critical to the patentability of its alleged invention, and that "[*a*]*ll three* references further teach the advantages of a modular design." *Id.* at 36a-37a (emphases added).

Collins sought rehearing before the Federal Circuit and, according to its complaint in this action, "explained, inter alia, AT&T's deception and mischaracterization of Figure 5 of the Granello article." Pet. App. 55a. In its request for rehearing, Collins accused AT&T of "deception," "artifice," "prevarication," "utterly false" representations, and use of "the big lie." Pet. for Reh'g at 3, 8. Collins also asked the Federal Circuit to consider new evidence, in the form of "amicus letters." The Federal Circuit directed AT&T to respond to Collins' petition. Pet. App. 55a. Thus, prior to issuing its mandate, the Federal Circuit had before it the Granello article, AT&T's representations concerning that article, and Collins' explanation as to why those representations were allegedly fraudulent. The Federal Circuit then denied Collins' petition.

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of Granello. The PTO, however, later reversed itself and found claim 29 valid—a fact the Federal Circuit was aware of before it issued its decision. *See* Pet. App. 37a ("we are not unmindful that on reexamination the PTO, after initial rejection of claim 29 . . . withdrew that rejection").

After unsuccessfully seeking rehearing *en banc* (*Collins Licensing, L.P.* v. *American Tel. & Tel. Co.*, Nos. 92-1201, 92-1294, & 92-1302, 1994 U.S. App. LEXIS 834 (Fed. Cir. Jan. 11, 1994)), Collins filed a petition for a writ of certiorari. In its petition, Collins argued that the Federal Circuit's decision was "factually wrong." Pet. for Writ of Certiorari at 7 n.4 (Apr. 11, 1994). Collins claimed that the Federal Circuit had "adopted its own interpretation of the key prior articles" (*id.* at 8) without "com[ing] to grips with the trial evidence, which demonstrated that its interpretation of the prior art was incorrect." *Id.* at 6. This Court denied Collins' petition. *Collins Licensing, L.P.* v. *American Tel. & Tel. Co.*, 511 U.S. 1137 (May 31, 1994).

2. Seven months later, petitioner filed this action in a district court (the Northern District of Texas) that had no connection to the prior patent litigation. Alleging that AT&T had engaged in a "fraudulent scheme to nullify claim 29" of the Collins patent by making "false representations about Granello to the Federal Circuit" (Pet. App. 47a, 52a), Collins asserted four causes of action—intentional injurious falsehoods, intentional interference with protected property rights, fraud, and fraud on the government. *Id.* at 61a-63a. In support of these claims, petitioner alleged that the Federal Circuit's findings with respect to the Granello reference were "wrong" (*id.* at 55a) and sought, by way of damages, everything it had lost on appeal to the Federal Circuit—*i.e.*, "its judgment against AT&T," "post-judgment interest on the judgment," and a $500,000 license fee that "was contingent upon the outcome of the appeal in the Federal Circuit." *Id.* at 60a. Before AT&T's response was even due, Collins filed a motion for partial summary judgment in which it argued that "the finding by the Federal Circuit as to the contents of Granello . . . was . . . false" (Mem. in Supp. of Pl.'s Mot. for Partial Summ. J. or Similar Relief at 2) and that the district court could so rule as a matter of law.

See Pl.'s Mot. for Partial Summ. J. or Similar Relief at 2.[3]

AT&T moved to stay Collins' summary judgment motion and to dismiss the complaint on the ground that Collins' "tort" suit was an impermissible collateral attack on the Federal Circuit's mandate. AT&T argued that Collins effectively sought relief from the Federal Circuit's judgment while evading, through the guise of a tort suit, the strictures that govern such relief. Collins argued in response that its complaint sought "no such remedy" and that its suit was "neither a Rule 60(b) motion nor an 'independent action' contemplated by Rule 60(b)." Pl.'s Resp. to Def.'s Mot. to Dismiss at 2, 6. Collins claimed it was entitled to maintain a suit for tort damages without first obtaining any relief from the Federal Circuit's judgment and that the damages award Collins sought would not "change the prior judgment one iota." *Id.* at 9.

The district court granted AT&T's motion, finding that "the extraordinary relief that Collins seeks—essentially a ruling that a factual finding of the Federal Circuit is wrong—would effectively amount to relief from the Federal Circuit's judgment." Pet. App. 12a. The court held that it lacked jurisdiction to grant such relief in the absence of leave from the Federal Circuit. *Id.* at 11a-12a. A losing litigant, the court explained, cannot obtain relief from an appellate judgment by instituting a subsequent tort action; rather, "[r]elief from judgment would be the only proper remedy for and assertion of fraud on the court." *Id.* at 12a. The court dismissed the complaint "without prejudice" to afford Collins the opportunity to seek the proper relief. In the alternative, the court held that Collins' claims were barred by collateral estoppel.

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[3] Collins also argued that the district court could take "judicial notice" of the falsity of the Federal Circuit's findings or force AT&T, as part of a Rule 16(c) pretrial order, to agree that the appellate court's findings were false. Mem. in Supp. of Pl.'s Mot. for Partial Summ. J. or Similar Relief at 7-8.

The Fifth Circuit affirmed without oral argument in an unpublished per curiam opinion. Like the district court, the court of appeals found that, "[n]o matter how long or how loudly Collins professes that it does not seek relief from the mandate of the Federal Circuit, it cannot evade the facts to the contrary." *Id.* at 6a-7a. Collins' suit was "a collateral attack on the mandate of the Federal Circuit" and the district court had properly "refused to entertain such a specious complaint." *Id.* at 7a. The court also endorsed the district court's alternative ruling, holding that the Federal Circuit had already disposed of Collins' claims of fraud. *Id.* Finally, the court held that Collins' appeal was frivolous, sanctioned Collins and awarded AT&T its costs and attorneys' fees. *Id.* at 7a-8a.

3. Collins filed a petition for rehearing, ostensibly limited to the propriety of the sanctions, in which it continued to argue that its complaint "was not an attack on the patent infringement decision" (Pet. for Reh'g, Attach. A at 5) and that the Federal Circuit's invalidity ruling was "erroneous." Mem. in Opp. to Sanctions at 33. Collins also pointedly "denied" that its position on appeal was erroneous. *Id.* at 16. Following a show cause hearing, the court below again found that Collins' state-law tort claim "was purely and simply a collateral attack on the Federal Circuit's mandate" (Pet. App. 19a) and that Collins' decision to appeal the dismissal of that claim was "sanctionably frivolous." *Id.* at 30a.

The court explained that Collins was collaterally estopped because its assertions of fraud were "nothing but an attempt to re-assert that the Federal Circuit incorrectly interpreted the Granello Article as a matter of law." *Id.* at 23a. Collins was barred from asserting this claim because it had already "had a full and fair *opportunity* to . . . oppos[e] . . . AT&T's supposedly fraudulent and erroneous characterization of the Granello Article to the Federal Circuit" and the Federal Circuit has indisputably decided the issue. *Id.* (emphasis in original). In addition, Collins had explained why AT&T's representations

were allegedly fraudulent in its petition for rehearing to the Federal Circuit, and that court was properly presumed to have disposed of this argument when it issued its mandate after denying Collins' petition. *Id.* at 24a.

The court also explained that Collins should have recognized the propriety of the district court's jurisdictional ruling. All of the authority Collins relied on in support of its tort claim involved "equitable review of a final judgment, not . . . an independent state-law tort claim." *Id.* at 25a. Thus, Collins' own cases should have made clear "that its only appropriate recourse was to seek some sort of equitable review," which is "now governed exclusively by Rule 60." *Id.* Collins, however, had steadfastly and improperly refused to pursue such a remedy. *Id.* at 28a.

ARGUMENT

The courts below held that a state-law tort suit that requires a determination that an earlier, final judgment of an appellate court is "wrong" is necessarily a collateral attack on that judgment, and that such a suit cannot proceed unless the plaintiff first obtains equitable relief from the prior judgment. This decision does not conflict with the language of Rule 60(b) or the decisions of this or any other court. Collins' persistent and unreasonable arguments to the contrary simply confirm the propriety of the sanctions award.

1.A. Petitioner's reliance on the savings clause of Rule 60(b) is not merely misplaced but is disingenuous. That clause provides that the rule "does not limit the power of a court to entertain an independent action *to relieve a party from a judgment*." Fed. R. Civ. P. 60(b) (emphasis added). The independent action that the rule preserves is *not* a common law tort action "like Collins's" (Pet. at 13 n.3) but an equitable action for relief from a judgment. This is clear not only from the underscored portion of the rule quoted above, but from the Advisory Committee Notes, which state that "a new or independent action"

may be brought "to *set aside a judgment* upon those principles which have heretofore been applied in such an action." Fed. R. Civ. P. 60(b), 1946 Advisory Committee Notes (emphasis added).[4] Indeed, contrary to its current claim, Collins knows full well that its tort suit is not an independent action within Rule 60(b)'s savings clause: Collins repeatedly told the lower courts that its suit was "neither a Rule 60(b) motion *nor an 'independent action' contemplated by Rule 60(b)*" (Pl.'s Resp. to Def.'s Mot. to Dismiss at 6 (emphasis added)) and that it was *"not seeking to . . . set aside the judgment"* of the Federal Circuit (*id.* at 2 (emphasis added); *see also* Brief for Appellant Arthur A. Collins, Inc. at 12 (the complaint "is not seeking to amend or set aside the judgment" of the Federal Circuit)).

Collins eschewed this remedy because it could not satisfy the requirements that apply in such an action. These requirements include, among other things, "clear and convincing proof . . . that the evidence underlying the judgment was . . . fabricated or concealed" and a showing "that the fabrication or concealment was a material basis for the judgment and was not merely cumulative." *Restatement (Second) Judgments* § 70 cmt. d.[5] Here, of course, Collins canot show materiality, because the Fed-

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[4] *See also* 11 Charles A. Wright *et al., Federal Practice and Procedure* § 2868 (1995) ("The reference to 'independent action' in the saving clause is to what had been historically known simply as an independent action *in equity* to obtain relief from a judgment") (emphasis added).

[5] Relief from a judgment for fraud requires proof of egregious conduct, involving, for example, bribery of a judge, corrupt conduct by a party's attorneys, or document forgery. *See, e.g., Kenner* v. *Commissioner*, 387 F.2d 689, 691 (7th Cir. 1968); *Addington* v. *Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 668 (5th Cir. 1981); *Kerwit Med. Prods., Inc.* v. *N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980); *see also Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 240, 241, 242-43, 245 (1944) (fraud shown where "officials and attorneys . . . published in a trade journal [a bogus] article," the lawyer who wrote "the spurious

eral Circuit based its finding of invalidity not only on the Granello article, but on two other prior art references as well. Pet. App. 36a-37a. More fundamentally, the Granello article is not a fabrication but an indisputably *bona fide* publication. In fact, the "fraud" Collins alleged consisted of nothing more than contested legal argument in an *inter partes* proceeding—a "showing" that does not remotely justify relief from judgment.[6]

These stringent requirements are predicated upon policies of repose, respect for the finality of judgments and comity between courts—all of which provide a more than adequate answer for "why a tort action should be unavailable" in cases such as this one. Pet. at 10. Asking a district court to rule that a decision of an appellate court is "wrong" is a direct affront to the authority of that appellate court, which has an indisputable interest in protecting the integrity of its judgments. It is for this reason that "relief should ordinarily be sought in the court that rendered the judgment" (*Restatement (Second) Judgments* § 79 cmt. b) and "leave of the appellate court has been required before the district court may entertain an action attacking a judgment that has been affirmed on appeal." 11 Charles A. Wright *et al., Federal Practice and Procedure* § 2868 (1995). Moreover, Collins' baseless lawsuit has plainly frustrated AT&T's interest in repose.

Nor do the decisions below "preempt" state common law actions or "immuni[ze]" "[c]onduct that is tortious under state law." Pet. at 9-10. Because Rule 60(b) is "intended . . . [to] deal with the practice in every sort of

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publication" filed a brief that "[q]uot[ed] copiously from the article," and the litigant bribed a key potential witness to the fraud).

[6] *See* 11 Charles A. Wright *et al., Federal Practice and Procedure* § 2868 (1995) ("Resort to an independent action may be had only rarely, and then only under unusual and exceptional circumstances. It is not the function of an independent action to relitigate issues finally determined in another action between the same parties").

case in which relief from final judgments is asked, and [to] prescribe the practice" (Fed. R. Civ. P. 60(b), 1946 Advisory Committee Notes), the courts below properly held that the rule, including the independent equitable actions it permits, provides the "only appropriate recourse" to a party seeking relief from a final judgment. Pet. App. 25a. Nowhere, however, did the courts below rule that a party that obtains relief from a judgment may not thereafter institute a tort action; to the contrary, by dismissing Collins' case without prejudice, the district court left such a course open to Collins.

B. The three nineteenth century decisions of this Court that Collins cites in no way demonstrate that Collins' tort claims are proper. In none of these cases did this Court permit a party to bring a state-law based tort action for damages against a successful litigant. Rather, each case involved an independent equitable action to set aside a prior judgment—precisely the relief that Collins has steadfastly maintained it does not seek here. *See Arrowsmith* v. *Gleason*, 129 U.S. 86, 100 (1889) ("judgments may . . . be *set aside or rendered inoperative*" by a court of equity) (emphasis added); *Johnson* v. *Waters*, 111 U.S. 640, 667 (1884) (same); *Marshall* v. *Holmes*, 141 U.S. 589, 597-98 (1891) (a permissible independent action is "a bill in equity *to set aside a decree* for fraud") (emphasis added).[7] There is thus absolutely no conflict between these cases and the lower courts' determination that Collins likewise was required to seek "equitable review" of the Federal Circuit's judgment. Pet. App. 25a.

Nor does the decision below conflict in any way with the decisions of the Tenth or Second Circuits. In *Robinson* v. *Volkswagenwerk AG*, 56 F.3d 1268 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 705 (1996), the Tenth

[7] The underscored passages, moreover, plainly refute Collins' claims that the litigants in these cases did "not seek to overturn the judgment rendered in the prior litigation" (Pet. at 13) or that an independent action may be brought "without setting aside [the prior] judgment." *Id.* at 14 n.5.

Circuit did not hold that plaintiffs "were entitled to bring [a tort action for damages] instead of invoking Rule 60(b)." Pet. at 16. To the complete contrary, the Tenth Circuit, like the courts below, looked to the substance of the plaintiff's "tort" claims and concluded that the complaint was in reality "an 'independent action' for relief from the judgment recognized by Rule 60(b)." 56 F.3d at 1274. The Tenth Circuit expressly held that "the trial court was correct insofar as it concluded that plaintiffs *could not pursue their claims for damages without first obtaining relief from the judgment.*" *Id.* at 1273 (emphasis added). That, of course, is precisely what the courts below held in this case.[8]

Similarly, in *Cresswell* v. *Sullivan & Cromwell,* 922 F.2d 60 (2d Cir. 1990), the Second Circuit rejected the plaintiffs' claim that their complaint did " 'not seek[] "relief" from a "judgment" within the terms of Rule 60(b).' " Pet. at 15. Instead, like the Tenth Circuit and the courts below, the Second Circuit concluded that, in substance, "the present action is not an action at law" but "an independent [equitable] action to set aside a judgment." 922 F.2d at 71; *see also id.* at 70 (district court had "equitable jurisdiction to entertain an attack on the *Cresswell I* judgment"). The Second Circuit then remanded the case and directed the district court to determine whether plaintiffs' claims satisfied the "traditional equitable principles" that govern requests for relief. *Id.* at 71-72. These, of course, are precisely the principles that Collins sought to evade by labeling its complaint a tort action.

2.A. The lower courts also determined that Collins needed appellate leave before it could bring an action

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[8] The Tenth Circuit found that the district court had erred only in holding that a request for relief is governed by Rule 60(b)'s one-year time limit, noting that an independent action is not subject to this limitation. 56 F.3d at 1273. Here, the court below did not reject Collins' claims on timeliness grounds but because Collins did not seek either type of equitable relief permitted by the rule.

seeking a judgment that a Federal Circuit finding was "wrong." Collins cannot and does not claim that this holding, or the lower courts' interpretation of *Standard Oil Co.* v. *United States*, 429 U.S. 17 (1976), conflicts with the decisions of any other court. Nevertheless, Collins contends that the appellate leave rule does not apply here because "this litigation can in no way disturb the Federal Circuit's mandate." Pet. at 18.

This argument, which in and of itself does not warrant review of the decision below, was thoroughly "skewered" (Pet. App. 28a) by the lower courts. These courts found that the relief Collins sought, including a finding that the Federal Circuit's decision was "wrong" and an award of everything Collins lost on appeal, would indisputably nullify the appellate court's judgment. Pet. App. 7a, 12a, 19a. That reasoning is factually and analytically unassailable. *See Restatement (Second) Judgments* ch. 5, Introductory Note, at 140 (1982) (in an equitable suit for relief based on fraud, "the applicant seeks to nullify the judgment"). It is also perfectly consistent with authorities Collins itself has cited to this Court. *See, e.g., Robinson*, 56 F.3d at 1274 ("common law fraud claims are barred [where] they are inconsistent with facts underlying the prior judgment").

Collins also claims it was "extraordinary" for the panel to sanction Collins for believing that *Standard Oil* had abolished the appellate leave requirement in all cases. In advancing this claim, Collins once again willfully ignores post-*Standard Oil* appellate cases that consistently hold that the rule was abolished in cases involving *subsequently discovered* fraud perpetrated on the *district court* but continues to apply where the alleged fraud was perpetrated on the appellate court and pertains to the record before that court.[9] Respondent cited these cases in numerous

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[9] *See, e.g., Fine* v. *Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir. 1985); *Seese* v. *Volkswagenwerk, A.G.*, 679 F.2d 336, 337 & n.1 (3d Cir. 1982); *Puerto Rico* v. *SS Zoe Colocotroni*, 601 F.2d 39, 41 n.2 (1st Cir. 1979); *Eutectic Corp.* v. *Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) (per curiam).

pleadings below, as did the Fifth Circuit in its sanctions decision (Pet. App. 28a n.14), and Collins' awareness of this authority no doubt explains why it believes this "Court need not decide whether the district court's interpretation of *Standard Oil* is correct." Pet. at 18.

B. The lower courts' alternative determination that Collins' claims were barred by collateral estoppel involved the routine application of well-settled legal principles to a unique set of facts and does not raise any issue requiring this Court's attention. That determination was also manifestly correct. As the Fifth Circuit explained, the Federal Circuit necessarily determined in its validity decision that AT&T's statements concerning the Granello article were not false but true. Pet. App. 23a-24a. Those statements were based on evidence in the record before the Federal Circuit and were made in AT&T's opening brief to that court, thereby affording Collins an *opportunity* to litigate the truth or falsity of AT&T's statements. *Id.*

Collins' attacks on this reasoning fail to demonstrate any error, let alone a need for review by this Court. Collins argues, for example, that its decision not to challenge AT&T's claims on the merits in its brief before the Federal Circuit should not give rise to an estoppel (Pet. at 20), yet it cites no authority for this proposition and (once again) ignores contrary authority cited below. *See Harris Trust & Sav. Bank* v. *Ellis*, 810 F.2d 700, 705 (7th Cir. 1987) (where "an adverse party with opportunity and motive to contest [a] presentation chooses not to, the ensuing finding is entitled to the same respect as one litigated to the hilt"). Accordingly, Collins' assertion that the finding of collateral estoppel "must necessarily rest on the Federal Circuit's denial of Collins's petition for rehearing" (Pet. at 20) is flatly wrong.[10] And in claiming

[10] In all events, any reliance the lower courts placed on that denial was proper because the accuracy of AT&T's statements was squarely placed at issue and the Federal Circuit panel "must be presumed to have considered it on a motion for rehearing." *Fine,*

that the meaning of the Granello article "could only have been fairly determined by evidentiary proceedings in a trial court" (Pet. at 20), Collins simply re-hashes arguments it made to the Federal Circuit for why that court should not consider the issue of whether Granello invalidated claim 29.

3. The Fifth Circuit's decision to sanction Collins for prosecuting a baseless appeal and persisting in objectively unreasonable arguments was entirely justified and does not warrant an exercise of this Court's supervisory power. In the face of cogent analysis to the contrary, Collins persisted in claiming that it did not seek relief from the Federal Circuit's judgment and that its "tort" suit would not disturb that judgment; repeatedly argued that nineteenth century cases involving equitable relief from judgments somehow authorized prosecution of tort claims for damages without any need for relief from a prior judgment; and consistently ignored an unbroken line of authority requiring appellate leave in cases of alleged fraud on an appellate court. Collins repeats many of the same flawed arguments in its petition to this Court, and indeed has compounded them by making arguments that it knows are flatly inconsistent with the positions it took before the lower courts.

At bottom, Collins sought to evade the jurisdiction of the Federal Circuit while seeking to nullify a ruling of

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758 F.2d at 53; *see also NLRB* v. *Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953). *Cf. United States* v. *Cote*, 51 F.3d 178, 181 & n.2 (9th Cir. 1995) (denial does not indicate panel's view on a peripheral issue raised only in a footnote in the rehearing petition). For this reason, Collins is forced to argue that the Federal Circuit may have denied the petition because other prior art invalidated claim 29. Pet. at 21 n.9. Of course, if the panel denied the petition because claim 29 was invalid anyway, then AT&T's statements could not have caused Collins any injury. *See Restatement (Second) Judgments* § 70 cmt. d (party must show that "the fabrication or concealment was a material basis for the judgment and was not merely cumulative").

that court. It intentionally attempted to disguise its real claims as a state-law tort action because it knew that resort to the proper remedies under Rule 60(b) would entail seeking leave from the Federal Circuit (which had already rejected Collins' claims of fraud) and would require showings that Collins cannot make. This subterfuge was plainly improper and the Fifth Circuit appropriately sanctioned Collins for engaging in it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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